LIBRARY
SUPREME COURT, U.S.

FILED
NOV 8 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 73

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Appellant,

vs.

THE STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, PEERLESS OIL AND GAS COMPANY, A CORPORATION, COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, AND CITIES SERVICE GAS COMPANY, A CORPORATION,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF OF APPELLANT

H. D. (DON) EMERY,
RAYBURN L. FOSTER,
HARRY D. TURNER,
R. M. WILLIAMS,
All of Bartlesville, Oklahoma,
Attorneys for Appellant.

INDEX

Subject Index

	Page
Reply Brief of Appellant	1
General Statement	1
Reply to Proposition I	4
Reply to Proposition II	5
Reply to Proposition III	8
Reply to Proposition IV	8
Reply to Proposition V	10
Reply to Proposition VI	11
Reply to Proposition VII	11
Conclusion	11

Table of Cases Cited

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623	6
Burns Baking Co. v. *Bryan*, 264 U. S. 504	10
Cities Service Gas Company v. Peerless Oil and Gas Company et al., No. 153, October Term, 1950	1, 2
Commissioner of Internal Revenue v. *Independent Life Insurance Company* (6th CCA), 62 F. 2d 1066	6
Frost v. *Railroad Commission*, 271 U. S. 583	6
Hanover Fire Insurance Company v. *Carr*, 272 U. S. 494	6
Nebbia v. *New York*, 291 U. S. 502	10
New State Ice Co. v. *Liebmann*, 285 U. S. 262	10
Pierce Oil Corporation v. *Phoenix Refining Company*, 259 U. S. 125	6
Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389	6
Ribnik v. *McBride*, 277 U. S. 350	10
Seaborn v. *Wingfield (Nevada)*, 48 P. 2d 881	6
Sterling Refining Co. v. *Walker*, 165 Okl. 45, 25 P. 2d 312	10

Page

Spaulding v. *Douglas Aircraft Company* (9th CCA), 154 F. 2d 419 6
Thompson v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55 10
Tyson & Brother—United Theatre Ticket Officers v. *Banton*, 273 U. S. 418 10
United Fuel Gas Company v. *Railroad Commission of Texas*, 278 U. S. 300 6
Wall v. *Parrot*, 244 U. S. 407 6
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 10
Williams v. *Standard Oil Company*, 278 U. S. 235 6

STATUTES CITED

United States Code, Section 1257, Title 28 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 73

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
Appellant,

vs.

THE STATE OF OKLAHOMA, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, PEERLESS OIL AND GAS COMPANY, A CORPORATION, COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, TEXAS COUNTY LAND AND ROYALTY OWNERS ASSOCIATION, AND CITIES SERVICE GAS COMPANY, A CORPORATION,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF OF APPELLANT

General Statement

Before considering separately the several propositions presented in the brief of Appellees, certain general observations are in order.

Attention is called to the fact that Appellees both in their brief in this case and their brief in the case of *Cities*

Service Gas Company v. *Peerless Oil and Gas Company et al.*, No. 153, October Term, 1950, confirm the fact that Order No. 19515 is one directed solely against Cities Service Gas Company and that only Order No. 19514 is general in its application. We mention this in connection with the elimination of reference to and consideration of Order No. 19515 as having any relation to Appellant.

Appellees, however, in their briefs in both cases, in attempting to justify Order No. 19514, do not discriminate between a "producer" and the "purchaser" and the statutes and orders as applied to each. Although they at times refer to Order No. 19514 as applying to the production of gas, they for the most part talk of alleged evils having only to do with the pipe line purchasers of gas, principally Cities Service Gas Company, and treat the order as one directed against the purchaser. They talk about the monopolistic price and other controls by the gas purchasing companies; the discrimination by the purchasing companies between producers and as between pools; the refusal of Cities Service Gas Company as a purchaser to take ratably from other producers; and other matters that would relate only to persons engaged in purchasing gas from others. They refer to the findings of Orders Nos. 19514 and 19515, virtually all of which have to do with Cities Service Gas Company as a common purchaser. They cite Order No. 1662 of the Oklahoma Corporation Commission, dated July 1, 1920, as a precedent for the price fixing power of the Commission, which order was one made under the public utilities statutes of the State against a utility purchasing company regulating what it as a purchaser should pay to the well owners (see order set out in its entirety as Appendix D to brief of Appellant Cities Service Gas Company in Case No. 153).

In fact, Appellees in their brief in Case No. 153, which

they adopt in this case, refer to Order No. 19514 as one directed against purchasers as distinguished from producers. At page 2 of said brief they say, "Order No. 19514 is general, that is, is not directed to any company by name, but is intended to have general application to all *purchasers of gas* in the field, and it provides that no gas shall be taken therefrom at a price less than 7 cents per MCF at a pressure of 14.65 lbs.", and at page 55 they say, "It requires *purchasers to pay the same price* upon the same basis of measurement and thus not only prevents Appellant *and other purchasers* from discriminating as between sellers, but it makes the same requirement of all *purchasers*, and thus prevents discrimination as against Appellant." (Emphasis is ours). The term "Appellant" in the last quotation refers to Cities Service Gas Company.

Although the court below determined that only Order No. 19515 was made pursuant to Section 233, Title 52, O. S. 1941, Appellees in their brief cite and talk in terms of both said Section 233 and Section 240, Title 52, O. S. 1941, as authorizing both Orders Nos. 19514 and 19515. Said Section 233 clearly and unequivocally has to do with the obligation of a taker or purchaser of gas ratably from another as seller, whereas said Section 240 is expressly limited to persons declared to be "a common purchaser" and governs the purchase of gas by such a "purchaser".

Appellant Phillips Petroleum Company is simply a producer. It gathers, processes and sells or otherwise disposes of the processed by-products of gas from only its own wells. The only gas produced by it is gas determined by other orders of the Corporation Commission to be its ratable and fair share of the gas from the pool. It makes no sale of its gas or the products thereof at the wellhead or elsewhere in Oklahoma. It neither buys, sells nor transports gas of others. No one has demanded of Appellant

that it buy, sell or transport their gas. Appellant's situation involves no problem of ratable taking or of discrimination. It it not charged that Appellant is draining gas from under any leases other than its own. The only drainage talked about in this case is the alleged drainage by Cities Service Gas Company of gas from under the leases of Peerless Oil and Gas Company many miles distant from the leases of Appellant. Appellant is not a party to any dispute with any seller, buyer or other producer with respect to the price or terms of taking gas from the field. It is neither a party nor subject to any of the so-called monopolistic practices of pipe line purchasers. There is no alleged monopoly on the part of the producers. No criticism is made by anyone of the use or disposition made by Appellant of its gas.

Appellees in their brief do not charge the facts in respect to Appellant to be otherwise than as stated above.

The point we make is this, that the evils talked about by Appellees as justifying Order No. 19514 have to do primarily with purchasers and not to the order as applied to a producer. The court below determined that the order "applies to the production" of natural gas (R. 914).

With the foregoing in mind, we proceed to a separate consideration of the several propositions presented by Appellees in their brief in this case.

Reply to Proposition I

Appellant takes no issue with Appellees' Proposition I or of the cases cited in support thereof. Instead, Appellant in its principal brief accepted the statement of the court below that Order No. 19514 was made pursuant to the last sentence of Section 239, Title 52, O. S. 1941, to the effect that the Corporation Commission under certain circumstances was given the authority to prescribe rules and

regulations "to prevent waste, protect the interest of the public, and of all those having the right to produce therefrom, and to prevent unreasonable discrimination in favor of one such common source of supply as against another", and the court's interpretation thereof as giving to the Commission authority to fix prices "where necessary to the attainment of such ends", but then proceeded to point out wherein such interpretation is repugnant to Due Process, and wherein the particular order is not warranted under the facts, is void because of being vague, indefinite and uncertain, is arbitrary, unreasonable and confiscatory, has no reasonable relationship as the object of its enactment and goes beyond the demands of the occasion. Appellant does not attempt to go behind the interpretation by the court of such statute.

It is under Proposition I that Appellees cite Sections 231 through 233 of Title 52, O. S. 1941, as giving to the Corporation Commission the authority to fix the price of gas. Attention is called to the fact that the court below relies upon the 1913 law, of which such sections are a part, only as authority for Order No. 19515 directed against Cities Service Gas Company as a purchaser of gas from Peerless Oil and Gas Company, and not as authority for the general Order No. 19514, which alone applies to Appellant. In this respect the Appellees attempt to go behind the interpretation by the court below in respect to the applicable statutes.

Reply to Proposition II

The cases cited and relied upon by Appellees under their Proposition II state certain well defined principles with which Appellant does not in this case take issue. Such principles, however, have their limitations and are clearly not applicable here.

Although a state may prohibit a foreign corporation from doing intrastate business within the limits of such state, or may prescribe conditions upon the entry of a foreign corporation into the state, it may not as a condition to its entry in the state impose conditions which require relinquishment of rights guaranteed by the Federal Constitution, *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494; *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Frost* v. *Railroad Commission*, 271 U. S. 583; *Williams* v. *Standard Oil Company*, 278 U. S. 235, and the cases therein cited.

The case of *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125, and the other cases cited by Appellees as having followed such case, are all predicated on the principle of estoppel, that a person proceeding under and accepting the benefits of a particular statute may not be heard to attack the constitutionality of such statute. In the *Pierce Oil Corporation* case the Pierce Oil Corporation not only entered the state as a foreign corporation after the enactment of the statute but acquired the right to lay its lines and to carry on the particular business in which it was engaged under the particular statute claimed by it to be invalid. This Court held that it could not accept the rights and benefits dependent upon said statute and at the same time attack its constitutionality. This explanation and limitation of the effect of the said case is not only pointed out in the decision but is made clear in the cases cited by Appellees. See also *United Fuel Gas Company* v. *Railroad Commission of Texas*, 278 U. S. 300; *Wall* v. *Parrot*, 244 U. S. 407; *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Spaulding* v. *Douglas Aircraft Company* (9th CCA), 154 F. 2d 419; *Commissioner of Internal Revenue* v. *Independent Life Insurance Company* (6th CCA), 62 F. 2d 1066; *Seaborn* v. *Wingfield* (*Nevada*), 48 P. 2d 881.

In this case Appellant's ownership of its leases and the production of gas therefrom is not a right derived or enjoyed

by Appellant under and by virtue of any statute under attack in this case. The statute in question is merely a regulatory statute limiting such right.

Furthermore, the attack in this case is not leveled against anything inherent in the original statute itself but against the subsequent vague, indefinite, arbitrary, unwarranted and otherwise unconstitutional action of the Commission as applied to this Appellant under the facts and circumstances here present.

The fact that the principles relied upon by Appellees do not apply to a later unconstitutional order made pursuant to some earlier statute is conceded by Appellees at page 16 of their brief, wherein they say, "Of course, if the Commission, in requiring Appellant to take ratably, had fixed the price so high as to entail loss upon it or prevent it from making a profit, it would not be precluded by its acceptance of the statute from asserting that the order deprives it of property without due process * * *". The same would be true of any other constitutional objection to the order itself.

It is in connection with this same discussion that Appellees are again confused as to the nature of the order in question. They, at the bottom of page 16 and the top of page 17 of their brief, talk of the statute and order as requiring Appellant "to take ratably" and dealing with some price to be paid by Appellant in connection therewith. At page 17 they say, "But at present we are concerned only with the power to require ratable taking". As before stated, the position of Appellant as a producer does not involve any problem of ratable taking or of the payment by it of any price for gas so taken. The amount of gas it is allowed to produce is fixed by other orders of the Commission. It pays no one a price for its own gas.

Reply to Proposition III

Appellant does not in this case challenge the power of the State under proper facts and circumstances within the reasonable exercise of the police power to constitutionally fix the price of gas. Its objection goes to the uncertainty of the order and the absence of facts and circumstances indicating a reasonable relationship between the order and the accomplishment of the statutory purpose. Hence the cases cited by Appellees have no application.

It is under this proposition, in support of and as justifying an exercise of such power, that Appellees cite the 1920 order of the Corporation Commission fixing the price to be paid for gas in the Cushing field, cite the dissenting opinion in the case of *Republic Natural Gas Company* v. *State*, 334 U. S. 62, and talk about the "monopolistic price control by the long line gas companies". As before stated, the 1920 order of the Commission was one directed against a public utility in respect to prices paid by it to the producer for gas. The order in the *Republic* case was against the purchaser. The "monopolistic" conditions alleged by Appellees to exist are all on the part of the purchaser. All this may be of interest and have a bearing on an order directed against or the exercise of control over the purchaser, such as Order No. 19515 as against Cities Service Gas Company, but in no way supports an order such as Order No. 19514 directed against the producer and not the purchaser.

Reply to Proposition IV

Appellees' Proposition IV, in answer to the charge that Order No. 19514 is invalid because of being vague, indefinite and uncertain, wholly ignores the argument advanced by Appellant under its Point I.

The findings of Order No. 19702 may have the effect of clarifying Order No. 19514 to the extent of saying that it is

not necessary that the gas be sold at the wellhead, but wholly leaves unanswered the question as to how a producer who does not sell its gas at the wellhead, and particularly where the gas is not sold in its natural state, is to know in advance if and when it is getting the "equivalent" of the prescribed "price" "at the wellhead."

The questions in this regard are fully set out in our principal brief. Appellees offer no answer.

In fact, Order No. 19702 adds to the vagueness and uncertainty of the original order inasmuch as it talks in terms of "the equivalent of *approximately* 7 cents" per MCF at the wellhead. It does not define or otherwise let Appellant know what would be "approximate." We refer the Court to Appellant's response to Appellees' motion to dismiss in this case wherein we analyzed the evidence in regard to what the Appellant was receiving for the residue and other by-products of its gas at the time Order No. 19702 was entered and the confusion that results in respect to the uncertainty of the word "approximately."

Cases cited by Appellees all have to do with standards in a statute in connection with the delegation of authority to some administrative agency, which present an entirely different question. In those cases the uncertainty of the standards has only to do with the action, power and authority of the administrative agency, a State body having a degree of discretion in its exercise of authority under the statute. The statutes there involved are not self-executing and the private citizen is affected only after the administrative agency has acted. Such cases involve no element of penalty on the part of a private citizen for the violation of the indefinite statute.

In this case, however, the Appellant is faced with a final self-executing order prescribing certain rules of conduct, the violation of which is subject to severe penalties without

any discretion on the part of Appellant in respect to the interpretation thereof. Appellant must in advance guess if and when it is or is not in violation of the order.

Reply to Proposition V

Appellees' Proposition V shows how meager is the evidence in support of so drastic an order in this case. They cite no evidence other than that referred to in the brief of Appellant. Reference is made to Point II of Brief of Appellantf or further consideration thereof.

Absent entirely is any evidence of actual waste. Absent entirely is any evidence as to what the supposed relationship is between price and conservation. Absent entirely is any evidence of violation of correlative rights other than the alleged drainage by Cities Service Gas Company of gas from under leases of Peerless Oil and Gas Company several miles distant from the properties of Appellant.

The price in this case was not fixed because of any overwhelming public interest as was done in the case of *Nebbia* v. *New York*, 291 U. S. 502, and like cases, or for the protection of the "correlative rights" of the several owners of a common source of supply, but was solely for the economic advantage of Peerless Oil and Gas Company and the Royalty Owners. The case falls clearly within the principles announced in the cases of *Thompson* v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55; *Tyson & Brother—United Theatre Ticket Officers* v. *Banton*, 273 U. S. 418; *Williams* v. *Standard Oil Company*, 278 U. S. 235; *Wolff Packing Co*, v. *Court of Industrial Relations*, 262 U. S. 522; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Ribnik* v. *McBride*, 277 U. S. 350; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504; *Sterling Refining Co.* v. *Walker*, 165 Okl. 45, 25 P. 2d 312, cited in Appellant's principal brief.

Reply to Proposition VI

Appellant in its principal brief has not pressed its assignment of error relating to the subject matter of Appellees' Proposition VI and hence a reply thereto is unnecessary.

Reply to Proposition VII

If there is any merit in Points I and II set out in Brief of Appellant and in what has hereinbefore been said, then the order in question is an unlawful infringement of property rights of Appellant in violation of the Due Process clause of the United States Constitution with the result that a substantial federal question is involved. If there is no merit in such position then, of course, Appellant must lose its appeal on the merits and not because no federal question is involved.

The validity of Order No. 19514 was drawn in question in the court below on the ground of its being repugnant to the Constitution and laws of the United States and the decision of that court, the highest court of the State, was in favor of its validity. Such fact and circumstances present a federal question reversible by this Court on appeal under Section 1257, Title 28, United States Code.

Conclusion

In conclusion, we respectfully submit that the judgment below should be reversed.

H. D. (Don) Emery,
Rayburn L. Foster,
Harry D. Turner,
R. M. Williams,
All of Bartlesville, Oklahoma,
Attorneys for Appellant,
Phillips Petroleum Company.